Supreme Court, U.S.
FILED
JAN 3 1983
ALEXANDER L. STEVAS
CLERK

No. 82-168

In the Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TRANSPORTATION MANAGEMENT CORP.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

REX E. LEE
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

CAROLYN F. CORWIN
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

RICHARD MICHAEL FISCHL
Attorney

National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the National Labor Relations Board properly concluded that an employer violates Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), if its hostility to an employee's protected union activities is shown, by a preponderance of the evidence, to be a motivating factor in its decision to discharge the employee, and the employer cannot establish by a preponderance of the evidence that it would have discharged the employee for legitimate reasons, absent his union activities.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	3
Summary of Argument	7
Argument	11
The Board properly concluded that an employer violates Section 8(a)(3) of the National Labor Relations Act if its hostility to an employee's protected union activity is shown by a preponderance of the evidence to be a motivating factor in its decision to discharge the employee, and the employer cannot establish by a preponderance of the evidence that it would have discharged the employee for legitimate reasons, absent his union activities	11
A. The court of appeals improperly disregarded Congress's approval of the Board's consistent holdings under the Wagner Act that discipline motivated even in part by unlawful considerations violated Section 8(a)(3) unless the employer could show that it would have taken the same action in the absence of the impermissible motivation	14
B. The Board's allocation of burdens of proof is consistent with the decisions of this Court, with applicable statutes and regulations, and with accepted principles of proof	22
C. The Board concluded correctly that, following the General Counsel's prima facie showing, the respondent did not sustain its burden of showing by a preponderance of the evidence that it would have discharged Santillo for cause even absent his union activity	44
Conclusion	46

TABLE OF AUTHORITIES

Cases: Page

Allen v. *NLRB*, 561 F.2d 976 23
Allied Eastern States Maintenance Corp., 261 N.L.R.B. No. 167 38
Bay State Gas Co., 255 N.L.R.B. 708 31
Bedford Cut Stone Co., 235 N.L.R.B. 629 23
Behring International, Inc. v. *NLRB*, 675 F.2d 83, petition for cert. pending, No. 82-438 ..... 28, 32, 36, 38
Borden Mills, Inc., 13 N.L.R.B. 459 16
Bundy v. *Jackson*, 641 F.2d 934 42
Carl L. Norden, Inc., 62 N.L.R.B. 828 15
Coil-ACC, Inc., 262 N.L.R.B. No. 12 38
Coletti's Furniture, Inc. v. *NLRB*, 550 F.2d 1292 24
Consolidated Edison Co. of New York v. *Donovan*, 673 F.2d 61 29
Cupples Co. Manufacturers v. *NLRB*, 106 F.2d 100 15
De Anda v. *St. Joseph Hospital*, 671 F.2d 850 42
Dow Chemical Co., 13 N.L.R.B. 993, enforced in relevant part, 117 F.2d 455 ..... 15, 18
Eagle-Picher Mining & Smelting Co., 16 N.L.R.B. 727, enforced in relevant part, 119 F.2d 903 16
East Texas Motor Freight Systems, Inc. v. *Rodriguez*, 431 U.S. 395 ..... 10, 41, 42, 43
Eaton Corp., 262 N.L.R.B. No. 18 38
Eau Claire Press Co., 260 NLRB No. 148 38
Edgewood Nursing Center, Inc. v. *NLRB*, 681 F.2d 363 23
Electron Tube Division of Litton Systems, Inc., 260 N.L.R.B. No. 149 31
Emory Nursing Home, Inc., 260 N.L.R.B. No. 71 31
Fieldcrest Mills, Inc., 264 N.L.R.B. No. 86 37
Film Inspection Service, Inc., 144 N.L.R.B. 1040 23
Franks v. *Bowman Transportation Co.*, 424 U.S. 747 ..... 10, 41, 42
Furnco Construction Corp. v. *Waters*, 438 U.S. 567 ..... 39, 40
Givhan v. *Western Line Consolidated School District*, 439 U.S. 410 26
Gulf Oil Corp. v. *Copp Paving Co.*, 419 U.S. 186 22

Cases—Continued **Page**

Heartland Food Warehouse, Division of Purity Supreme Supermarkets, 256 N.L.R.B. 940, enforcement denied, 685 F.2d 421, petition for cert. pending, No. 82-736 31
Host Services, Inc., 263 N.L.R.B. No. 86 38
Jacksonville Bulk Terminals, Inc. v. *International Longshoremen's Association*, No. 80-1045 (June 24, 1982) 22
John W. Campbell, Inc., 58 N.L.R.B. 1153 15
Justak Brothers and Co. v. *NLRB*, 664 F.2d 1074 29
Kansas City Power and Light Co. v. *NLRB*, 111 F.2d 340 15
Kelly-Springfield Tire Co., 6 N.L.R.B. 325 16
Klate Holt Co., 161 N.L.R.B. 1606 23
Lafayette Steel Erector, Inc., 260 N.L.R.B. No. 160 38
League of United Latin American Citizens v. *City of Salinas Fire Department*, 654 F.2d 557 42
Lee v. *Russell County Board of Education*, 684 F.2d 769 41
Limestone Apparel Corp., 255 N.L.R.B. 722 26
Litton Mellonics Systems Division, a Division of Litton Systems, Inc., 258 N.L.R.B. 623 38
Local 357, Teamsters v. *NLRB*, 365 U.S. 667 ..... 12, 32
Loeb v. *Textron, Inc.*, 600 F.2d 1003 42
Lone Star Gas Co., 52 N.L.R.B. 1058 15
M.S.P. Industries, Inc. v. *NLRB*, 568 F.2d 166 23
Mallinckrodt Chemical Works, 63 N.L.R.B. 373 17
Marriott Corp., 251 N.L.R.B. 1355 31
Martel Mills Corp. v. *NLRB*, 114 F.2d 624 17
McCormick & Co., 254 N.L.R.B. 922 31
McDonald v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273 42
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792 39
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Curran*, No. 80-203 (May 3, 1982) 18
Milton v. *Weinberger*, 645 F.2d 1070 42
Mineola Ford Sales, Ltd., 258 N.L.R.B. 406 31
Montgomery Ward & Co. v. *NLRB*, 107 F.2d 555 17
Mt. Healthy City School District Board of Education v. *Doyle*, 429 U.S. 274 ..... *passim*

Cases—Continued **Page**

Muntin v. *State of California Parks and Recreation Department*, 671 F.2d 360 41-42
Nanty v. *Barrows Co.*, 660 F.2d 1327 42
NLRB v. *Ayer Lar Sanitarium*, 436 F.2d 45 23
NLRB v. *Barrett Co.*, 135 F.2d 959 17
NLRB v. *Big Three Industries, Inc.*, 497 F.2d 43.. 23
NLRB v. *Billen Shoe Co.*, 397 F.2d 801 24
NLRB v. *Carbonex Coal Co.*, 679 F.2d 200 29
NLRB v. *Charles Batchelder Co.*, 646 F.2d 33 ..... 26, 29
NLRB v. *Comgeneral Corp.*, 684 F.2d 367 29
NLRB v. *Entwistle Mfg. Co.*, 120 F.2d 532 17
NLRB v. *Fibers Int'l Corp.*, 439 F.2d 1311 24
NLRB v. *Fixtures Mfg. Corp.*, 669 F.2d 547 28
NLRB v. *Fruit Packers*, 377 U.S. 58 21
NLRB v. *Great Dane Trailers, Inc.*, 388 U.S. 26.... 36
NLRB v. *Great Eastern Color Lithographic Corp.*, 309 F.2d 352, cert. denied, 373 U.S. 950 23
NLRB v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170 ..... 18, 22
NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 ..... 11-12, 32
NLRB v. *Kentucky Fire Brick Co.*, 99 F.2d 89 17
NLRB v. *Remington Rand, Inc.*, 94 F.2d 862, cert. denied, 304 U.S. 576 ..... 16, 17
NLRB v. *Stackpole Carbon Co.*, 105 F.2d 167, cert. denied, 308 U.S. 605 17
NLRB v. *Webb Ford, Inc.*, 689 F.2d 733 29
NLRB v. *West Side Carpet Cleaning Co.*, 329 F.2d 758 23
NLRB v. *Whitin Machine Works*, 204 F.2d 883.... 24
Neptune Water Meter Co. v. *NLRB*, 551 F.2d 568.. 23
North Haven Board of Education v. *Bell*, No. 80-986 (May 17, 1982) 21, 22
Pacific Intermountain Express Co., 264 N.L.R.B. No. 47 38
Parker Hannifin Corp., 259 N.L.R.B. 263 38
Peavey Co. v. *NLRB*, 648 F.2d 460 29
Philip Vandernoot, 64 N.L.R.B. 529 16-17
Radio Officers' Union v. *NLRB*, 347 U.S. 17 32
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367.. 22
Republic Creosoting Co., 19 N.L.R.B. 267 15

Cases—Continued **Page**

Republic Die and Tool Co. v. *NLRB*, 680 F.2d 463 .. 29
Robbins Tire & Rubber Co., 69 N.L.R.B. 440, enforced, 161 F.2d 798 .. 17
St. Joseph Hospital Corp., 260 N.L.R.B. No. 89 .. 38
Salmon & Cowin, Inc., 57 N.L.R.B. 845, enforced, 148 F.2d 941, cert. denied, 326 U.S. 758 .. 16
Singer Co. v. *NLRB*, 429 F.2d 172 .. 23
Sioux City Brewing Co., 82 N.L.R.B. 1061 .. 23
Speas v. *Merchants Bank & Trust Co.*, 188 N.C. 524, 125 S.E. 398 .. 35
Standard Service Bureau, 87 N.L.R.B. 1405 .. 23
Teamsters v. *United States*, 431 U.S. 324 .. 41, 42
Texas Department of Community Affairs v. *Burdine*, 450 U.S. 248 .. 10, 23, 36, 38, 39, 40, 43
United Broadcasting Co., 253 N.L.R.B. 697 .. 31
United Dredging Co., 30 N.L.R.B. 739 .. 15
United States Postal Service Board of Governors v. *Aikens*, No. 81-1044 (argued Nov. 9, 1982) .. 39
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 .. 44
Village of Arlington Heights v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 .. 26, 27, 28, 32, 41
WNAC-TV Division, RKO General, Inc., 264 N.L.R.B. No. 31 .. 38
Walker v. *Ford Motor Co.*, 684 F.2d 1355 .. 41
Williams v. *Boorstin*, 663 F.2d 109 .. 42
Wolf Street Supermarkets, Inc., 264 N.L.R.B. No. 150 .. 31
Wright-Hibbard Industrial Electric Truck Co., 67 N.L.R.B. 897 .. 17
Wright-Line, a Division of Wright Line, Inc., 251 N.L.R.B. 1083, enforced, 662 F.2d 899, cert. denied, No. 81-987 (Mar. 1, 1982) .. *passim*
Zurn Industries, Inc. v. *NLRB*, 680 F.2d 683 .. 28-29

Statutes, regulation, and rule:

Administrative Procedure Act, Section 7(c), 5 U.S.C. 556(d) .. 34
Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq.* .. 10, 39
Energy Reorganization Act, 42 U.S.C. (Supp. IV) 5851 .. 29

Statutes, regulation, and rule—Continued Page

Labor Management Relations Act, ch. 120, 61 Stat. 136 15
National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
Section 3(d), 29 U.S.C. 153(d) 12
Section 7, 29 U.S.C. 157 ..... 2, 4, 37
Section 8(a)(1), 29 U.S.C. 158(a)(1) 2, 4
Section 8(a)(3), 29 U.S.C. 158(a)(3) ..... 2, *passim*
Section 10(c), 29 U.S.C. 160(c) 2, 9, 12, 18, 19, 20, 21, 28, 33, 34
29 C.F.R. 101.10(b) 12, 34
Fed. R. Evid. 301 35

Miscellaneous:

Amendments to the National Labor Relations Act: Hearings on H.R. 8, H.R. 725, H.R. 880, H.R. 1095, and H.R. 1096 Before the House Comm. on Education and Labor, 80th Cong., 1st Sess. (1947) 18
93 Cong. Rec.:
pp. 6518-6519 ..... 20, 21
p. 7529 20
H.R. Rep. No. 245, 80th Cong., 1st Sess. (1947) 18, 19
H.R. Rep. No. 510, 80th Cong., 1st Sess. (1947) 19, 21
T. Iserman, *Industrial Peace and the Wagner Act* (1947) 18
3 *NLRB Annual Report* (1939) 18
5 *NLRB Annual Report* (1941) 18
6 *NLRB Annual Report* (1942) 18
7 *NLRB Annual Report* (1943) 18
9 J. Wigmore, *Evidence* (Chadbourn Rev. 1981) 34, 35

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-168

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

TRANSPORTATION MANAGEMENT CORP.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a)[1] is reported at 674 F.2d 130. The decision and order of the National Labor Relations Board (Pet. App. 10a-16a) and the decision of the administrative law judge (Pet. App. 17a-45a) are reported at 256 N.L.R.B. 101.

JURISDICTION

The judgment of the court of appeals (Pet. App. 9a) was entered on April 1, 1982. On June 18, 1982, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including July 30, 1982. The

[1] "Pet. App." refers to the appendix to the petition for writ of certiorari; "J.A." refers to the joint appendix prepared pursuant to Rule 30.

petition was filed on that date and was granted on November 15, 1982 (J.A. 130). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act, 29 U.S.C. 157, provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in pertinent part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), provides in pertinent part:

> * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of

this Act: * * * No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. * * *

STATEMENT

1. Respondent provides transportation services to various local school boards in Massachusetts. On Monday, March 19, 1979, Sam Santillo, a school bus driver employed by respondent, and a fellow employee visited the offices of a local of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("the union"). They met with union officials and discussed union representation for respondent's drivers, and Santillo signed an authorization card designating the union as his collective-bargaining representative (Pet. App. 18a, 19a; J.A. 10-11). During the following week Santillo spoke to a number of fellow employees about the union, learned that some were interested, and obtained and distributed additional authorization cards. Several employees signed the cards and returned them to Santillo (Pet. App. 19a; J.A. 11-12, 19). On Saturday, March 24, Santillo telephoned nearly all of respondent's 70 drivers and told them of a union organizational meeting scheduled for Monday evening, March 26 (Pet. App. 19a, 24a; J.A. 12-13, 29).

During the same week, beginning on March 22, George Patterson, respondent's area manager in Santillo's area, conducted what the Board found to be "an extensive campaign of interrogating a number of employees about their union activities," and thereby "ascertained that Santillo was one of the prime organizers of the union campaign" (Pet. App. 10a-11a, 19a-23a; J.A. 9, 38-40, 63-65, 83-84, 86-88). At one point, Patterson told employee Baer that he had learned of Santillo's involvement with the union, that Santillo was "two faced," and that he was "going to get even with Santillo" (Pet. App. 20a; J.A. 87). Patterson also asked employee West, who was Santillo's

brother-in-law, "What's with Sam and the Union?"; when West gave a noncommital response, Patterson stated that he took Santillo's activities "'personal,'" referred to certain favors he had extended to Santillo in the past, and said that he would "remember" Santillo's union activities when Santillo sought such favors in the future (Pet. App. 20a; J.A. 83-84). On Saturday morning, Santillo, having learned of Patterson's statements, telephoned Patterson; both were conciliatory, but Patterson said that, when Santillo came to work on Monday, Patterson would "have to pretend in front of other employees that he was mad at Santillo" (Pet. App. 21a; J.A. 12, 31-32).

The following Monday, March 26, Patterson fired Santillo "for leaving his keys in the bus, and taking unauthorized breaks" (Pet. App. 24a). Santillo asked to have the reasons for his discharge put in writing; after discussing Santillo's union involvement by telephone with respondent's president, Patterson refused this request. When Santillo said he would challenge his firing, Patterson said: "By the way this has nothing to do with the Union" (Pet. App. 24a-25a; J.A. 14-15, 32-33, 44-45, 59-60, 69-71).

2. The Board affirmed the decision of the administrative law judge. It found that Santillo's discharge violated Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), which makes it an unfair labor practice for an employer "by discrimination in regard to * * * tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[2] In reaching this conclusion,

[2] The Board concluded that respondent's violation of Section 8(a)(3) also constituted a violation of Section 8(a)(1), 29 U.S.C. 158(a)(1), which prohibits an employer from interfering with or restraining employees in the exercise of rights guaranteed by Section 7, 29 U.S.C. 157. In addition, the Board upheld the administrative law judge's findings that respondent violated Section 8(a)(1) by threatening and coercively interrogating employees and by creating the impression that employees were under surveillance

the Board applied the test it had articulated in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, No. 81-987 (Mar. 1, 1982). In *Wright Line* the Board explained that, in determining whether an employer's action violated Section 8(a)(3), it would first require the General Counsel to show that the employer's opposition to the employee's protected activities was a "motivating factor" in the employer's decision to discipline the employee. If the General Counsel made this showing, the Board—explicitly following this Court's decision in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977)—ruled that the employer nevertheless could avoid an unfair labor practice finding if it demonstrated that it would have taken the same action even if the employee had not engaged in protected activities. 251 N.L.R.B. at 1089.

In this case, the Board concluded, the General Counsel established that respondent "evidenced a strong union animus," that it "had knowledge of Santillo's union activity and * * * intended to retaliate against Santillo" because of that activity, and that it discharged him the first working day after a company official threatened to "get even" with Santillo for his active union support (Pet. App. 12a). The Board accordingly found that the General Counsel had "established by strong and credible evidence a *prima facie* case for finding that Santillo was discharged in violation of Section 8(a)(3)" (*ibid.*).

The Board then considered whether respondent "has shown, by other evidence, that Santillo's discharge would have occurred without regard to these considerations" (Pet. App. 12a). The first reason respondent offered for discharging Santillo was that he had left his keys in his bus. The Board noted that the evidence showed that it was not uncommon for drivers to leave their keys in the buses and that Patterson had admittedly decided to dis-

---

because of union activities (Pet. App. 10a-11a, 40a). The court of appeals sustained these latter findings (*id.* at 2a), and no issue concerning them is presented here.

charge Santillo before he learned that Santillo had left his keys in the bus on the day of the discharge (*id.* at 12a, 29a-31a, 36a; J.A. 17, 33-34, 50-52, 67-69, 89). It therefore concluded that this was a "purely pretextual reason which does more to detract from the lawfulness of the discharge than support it" (Pet. App. 12a). Respondent's second alleged reason was that Santillo took unauthorized coffee breaks. The Board found that this too was "normal practice among the drivers" and that it was "tolerated unless [it] * * * adversely affected the driver's job performance," in which case respondent might take some nondisciplinary corrective action, such as changing the driver's route (*id.* at 12a-13a). But the Board found that no driver had ever been disciplined, "much less * * * suspen[ded] or discharge[d]," for this reason (*id.* at 13a; see also *id.* at 25a-28a, 37a; J.A. 16-17, 33, 71-76, 84-85, 88, 90-94).

The final reason offered by respondent was that Santillo made unauthorized stops at his home. While the Board acknowledged that respondent did not condone this practice, it found that respondent did not confront Santillo when it first confirmed that he was making such stops, that it did not warn him of the possible consequences, and that it did not "follow its regular procedure of [issuing] three written warnings before [a] discharge" (Pet. App. 13a; see also *id.* at 28a-29a, 37a, 38a; J.A. 44, 66-68, 77-79, 104-105). The Board therefore concluded that respondent had not "establish[ed] * * * that Santillo would have been discharged, even absent his union activities" and accordingly had not met its burden of overcoming the General Counsel's case (Pet. App. 13a). The Board ordered Santillo reinstated with backpay (*id.* at 13a-14a, 42a).

3. The court of appeals refused to enforce the Board's order, citing its prior holding that the Board's *Wright Line* test is inconsistent with the National Labor Relations Act. In its earlier opinion, *NLRB* v. *Wright Line*, 662 F.2d 899 (1st Cir. 1981), the court of appeals had concluded that, even if the General Counsel had shown

that an impermissible motive underlay an employer's action against an employee, the employer had only the burden of *producing evidence* that it would have taken the same action for permissible reasons. *Id.* at 905.[3] The court in the present case stressed that it rejected a test that places on an employer that has been shown to have acted for an impermissible reason the burden of "overcoming" the General Counsel's case, i.e., of proving by a preponderance of the evidence that it would have taken the same action for legitimate reasons (Pet. App. 3a, citing *NLRB* v. *Wright Line*, *supra*). The court remanded the case to the Board for reconsideration under the standard it had specified (Pet. App. 3a).

SUMMARY OF ARGUMENT

The Board, in its *Wright Line* decision, 251 N.L.R.B. 1083, properly concluded that an employer violates Section 8(a)(3) of the National Labor Relations Act if its hostility to an employee's protected union activity is shown, by a preponderance of the evidence, to be a motivating factor in its decision to discharge the employee, and the employer cannot establish by a preponderance of the evidence that it would have discharged the employee for legitimate reasons, absent his union activities. The court of appeals incorrectly rejected the Board's application of the *Wright Line* standard for allocation of burden of proof, holding that in a dual motive Section 8(a)(3) case the employer should bear only the burden of production of evidence that legitimate factors motivated its decision, not the burden of persuasion that those factors actually caused the discipline or discharge.

1. The court of appeals improperly disregarded Congress's approval of the test previously applied by the

---

[3] In *Wright Line* itself the court enforced the Board's order, because it concluded that the feature of the Board's test it had rejected was not material to the outcome of the case before it. 662 F.2d at 907-909.

Board, which was substantially identical to the later *Wright Line* formulation for allocation of the burden of proof. Under the Wagner Act, passed in 1935, the Board held consistently that an employer that had been shown to be motivated in part by unlawful considerations in discharging an employee violated Section 8(a)(3) unless it could show that it would have taken the same action in the absence of the employee's protected activity. In 1947, during Congress's consideration of the Taft-Hartley amendments, industry representatives criticized that approach and persuaded the House of Representatives to adopt language that would have required the General Counsel to prove that an employee was not discharged for cause. However, Congress rejected the House language. Members of the conference committee, including Senator Taft himself, stated that the language eventually adopted was designed to reaffirm the Board's existing practice, which placed on the employer the burden of proving that it would have taken the action at issue for lawful reasons. Thus, the aspect of the Board's *Wright Line* test that the court below rejected is precisely the practice that was approved by Congress in 1947.

2. a. In *Wright Line*, the Board allocated the burden of proof in Section 8(a)(3) cases in a manner consistent with its long-standing practice approved by Congress, but reformulated its approach based on this Court's decision in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977). The Board believed that such a reformulation would help to eliminate the confusion that had arisen in the courts of appeals in connection with the Board's approach to dual motive Section 8(a)(3) cases. *Mt. Healthy* involved the analogous problem of the discharge of a public employee for two different reasons, one legitimate and the other based on opposition to constitutionally protected conduct engaged in by the employee. In light of the similarity between dual motive Section 8(a)(3) cases and situations such as that in *Mt. Healthy*, the Board properly adopted the Court's con-

clusion that, once the employee had shown that protected conduct was a "motivating factor" in the employer's decision, the burden shifted to the employer to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct.

b. The court below erred in concluding that the Board exceeded its statutory authority and acted contrary to established principles of proof in applying the *Mt. Healthy* allocation of burden of proof to Section 8(a)(3) cases. The court's conclusion appears to be based on a misunderstanding of the nature of the prima facie case the General Counsel must make under *Wright Line*. That prima facie case does not consist merely of enough evidence to support a presumption that the employer has acted unlawfully; rather, the General Counsel must show, by a preponderance of the evidence, that the employer in fact was motivated, at least in part, by opposition to the employee's protected activity. In view of the General Counsel's showing of conduct that effectively constitutes a violation of Section 8(a)(3), the employer clearly must do more than demonstrate that there was a legitimate reason that *could* have motivated its action, which is the only showing required by the court of appeals. In order to avoid liability, the employer must establish as an affirmative defense that its unlawful conduct was harmless, since it would have taken the same action in the absence of the unlawful motive. This approach is fully consistent with Section 10(c) of the Act and with established principles of proof. Indeed, the legislative history of the 1947 amendments makes clear that Congress intended that the burden of proof remain on the employer to show that it would have taken the action in question for legitimate reasons, even in the absence of the employee's protected activity. The formulation proffered by the court of appeals would diminish substantially the protection afforded to employees under the Act by requiring the General Counsel to assume not only the burden of dem-

onstrating an unlawful motive for an employer's action, but also the difficult task of proving a negative—that there was no legitimate reason that might have caused the employer to take the same action regardless of the protected activity. On the other hand, since the employer is in the best position to know, and thus to prove, whether it was motivated by legitimate reasons, the Board's *Wright Line* formulation places an entirely proper burden on the employer.

c. The court below suggested (662 F.2d at 907) that the Board's *Wright Line* allocation of burdens of proof is somehow inconsistent with this Court's decision in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). In fact, *Wright Line* and *Burdine* are fully consistent. The Court in *Burdine* described the manner in which a plaintiff could go about proving the ultimate fact of an employer's discriminatory motive in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The ultimate showing made by the Title VII plaintiff is similar to the proof of discriminatory motive that the General Counsel must make under *Wright Line*. Only when the General Counsel makes such a showing does *Wright Line* provide that the burden shifts to the employer to demonstrate that it would have taken the same action in the absence of the protected activity. This is a stage that is not reached in the *Burdine* analysis, which deals only with the plaintiff's proof of discriminatory motive. However, in other Title VII cases this Court has indicated that, once discrimination has been proved, the employer can avoid reinstatement and an award of back pay only if it can show that it would have taken the same action in the absence of the discrimination. See *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 404 n.9 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 772-773 & n.32 (1976). Thus, *Wright Line* is consistent with the Title VII precedents.

3. The Board's determination that respondent did not meet its burden of showing that it would have discharged Santillo even in the absence of his union activity is supported by substantial evidence on the record as a whole. Although the General Counsel met his burden of establishing that respondent's union animus was a motivating factor in its decision to discharge Santillo, respondent did not succeed in demonstrating that any or all of its three alleged reasons—Santillo's leaving his keys in his bus, his coffee breaks, and his unauthorized stops at home—would have caused it to discharge Santillo regardless of his union activity. Thus, the court of appeals should have enforced the Board's order.

ARGUMENT

THE BOARD PROPERLY CONCLUDED THAT AN EMPLOYER VIOLATES SECTION 8(a)(3) OF THE NATIONAL LABOR RELATIONS ACT IF ITS HOSTILITY TO AN EMPLOYEE'S PROTECTED UNION ACTIVITY IS SHOWN BY A PREPONDERANCE OF THE EVIDENCE TO BE A MOTIVATING FACTOR IN ITS DECISION TO DISCHARGE THE EMPLOYEE, AND THE EMPLOYER CANNOT ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT IT WOULD HAVE DISCHARGED THE EMPLOYEE FOR LEGITIMATE REASONS, ABSENT HIS UNION ACTIVITIES

Section 8(a)(3) of the Act makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment * * * to encourage or discourage membership in any labor organization * * *." This provision "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them"; however, the "employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301

U.S. 1, 45-46 (1937). See also *Local 357, Teamsters* v. *NLRB*, 365 U.S. 667, 675 (1961). The General Counsel of the Board, who is vested with the responsibility for prosecuting unfair labor practice cases before the Board, 29 U.S.C. 153(d), must prove an unfair labor practice "upon the preponderance of the testimony taken." 29 U.S.C. 160(c).[4] The Board may not order reinstatement or back pay for any employee who was "suspended or discharged for cause." *Ibid.*

The basic question in this case involves the scope of the General Counsel's burden of proof in "dual motive" Section 8(a)(3) cases, i.e., cases in which the decision to discipline an employee is motivated both by opposition to the employee's engaging in union or other protected activities and by a legitimate business reason.[5] For more than 40 years, the Board has taken the position that, once the General Counsel has shown by a preponderance of the evidence that an employee's protected activity was a motivating factor in the employer's decision to discharge or discipline the employee, a violation of Section 8(a)(3) is established unless the employer shows by a preponderance of the evidence that it would have taken the same action for legitimate reasons, absent the employee's protected activities. In the Board's view, this standard properly accommodates the interests of both employers and employees and takes account of both the purposes of the Act and the practical aspects of proof. Congress expressly rejected an attempt to overrule the Board's standard at the

---

[4] See also Section 101.10(b) of the Board's Rules and Regulations, 29 C.F.R. 101.10(b), which provides in pertinent part:

> The Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act * * *.

[5] In addition to "dual motive" cases are so-called "pretext" cases, in which the General Counsel shows that an employer's asserted reason for its action is a sham. Since there is no legitimate business justification for the decision, there is no dual motive, but only an unlawful one. See *Wright Line, supra*, 251 N.L.R.B. at 1083-1084.

time of passage of the Taft-Hartley amendments in 1947, thus indicating approval of the Board's well-established practice.

The Board has continued to follow the same approach in dual motive cases, and, several years ago, in its *Wright Line* decision, 251 N.L.R.B. 1083, reformulated its test by adopting the framework set out by this Court in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977). *Mt. Healthy* involved denial of tenure to a public employee based on dual motives, one proper and the other improper. The Court in *Mt. Healthy* held, *inter alia*, that the fact that constitutionally protected conduct had played a " 'substantial part' " in a public employer's decision not to rehire an employee would not necessarily justify reinstatement and an award of back pay. *Id.* at 285. Instead, the Court held that the initial burden was properly placed on the employee to show that his conduct was constitutionally protected and was a substantial factor, or motivating factor, in the employer's decision not to rehire him; however, once the employee had carried that burden, the lower court should have proceeded to determine whether the employer "had shown by a preponderance of the evidence that it would have reached the same decision * * * even in the absence of the protected conduct." *Id.* at 287. Following the *Mt. Healthy* approach, the Board indicated that, once the General Counsel shows that protected activity was a motivating factor in the discharge of an employee, the burden shifts to the employer to show that it would have taken the same action for legitimate reasons absent the protected activity. 251 N.L.R.B. at 1089.

Despite the apparent consistency of the *Wright Line* test with longstanding Board practice and this Court's approach in *Mt. Healthy*, as well as congressional approval of the Board's practice, the court of appeals declined to enforce the Board's order in this case on the ground that the *Wright Line* test improperly allocates the burden of proof between the Board's General Counsel and

the employer in dual motive cases. In the court of appeals' view, once the General Counsel has shown that an employee's protected activity was a motivating factor in an employer's decision to discipline or discharge the employee, the employer should bear only the burden of *production* of evidence that legitimate factors motivated its decision, not the burden of *persuasion* that those factors in themselves would have resulted in the discipline or discharge. 662 F.2d at 904. In the court's view, it is the General Counsel's burden to show not only that an improper consideration motivated the discipline or discharge, but also that the adverse action would not have occurred for other reasons in the absence of any protected activities. In so holding, the court improperly rejected the Board's consistent practice and disregarded Congress's approval of that practice. Moreover, the court appears to have misunderstood the manner in which the *Wright Line* test operates. That test is fully consistent with the decisions of this Court, applicable statutes and regulations, and traditional principles of proof.

A. The Court of Appeals Improperly Disregarded Congress's Approval of the Board's Consistent Holdings Under The Wagner Act That Discipline Motivated Even in Part by Unlawful Considerations Violated Section 8(a)(3) Unless the Employer Could Show That It Would Have Taken the Same Action in the Absence of the Impermissible Motivation

The court of appeals, in rejecting the Board's allocation of burdens of proof in *Wright Line*, improperly disregarded the fact that in 1947 Congress expressly rejected an effort to change the Board's practice in dual motive cases. The practice approved by Congress was essentially the same as that rejected by the court of appeals.

1. Soon after the enactment of the Wagner Act in 1935, the Board developed a consistent standard of proof for Section 8(a)(3) cases.[6] The Board held that where "a

[6] Section 8(3), the relevant section of the 1935 Act, is in all material respects identical to Section 8(a)(3) of the present Act. Therefore, we shall refer to the provision by its current designation.

substantial motive for the discharg[e] was the [employer's] desire to thwart the nascent Union[, a] violation is * * * established whether or not the [employer] may have had some other motive in addition * * *." *Dow Chemical Co.*, 13 N.L.R.B. 993, 1023 (1939), enforced in relevant part, 117 F.2d 455 (6th Cir. 1941). The Board, with court approval, adhered to this rule throughout the period prior to the 1947 enactment of the Taft-Hartley amendments (Labor Management Relations Act, ch. 120, 61 Stat. 136).[7]

At the same time, the Board, again with court approval, decided that an employer whose action was motivated in part by unlawful considerations should be given the opportunity to avoid liability under Section 8(a)(3) if it could show that it would have taken the same action in the absence of the impermissible motive. However, the Board made it clear that in such cases the burden of

---

[7] See, e.g., *Republic Creosoting Co.*, 19 N.L.R.B. 267, 294 (1940) (violation found even though "other reasons, having no relation to [employee's] union membership or activity, apparently entered into the respondents' decision"); *United Dredging Co.*, 30 N.L.R.B. 739, 766 n.24 (1941) (discharges at issue "would be unlawful even if there were, in addition to a desire to discourage union membership, other motives"); *Lone Star Gas Co.*, 52 N.L.R.B. 1058, 1060 (1943) (violation found since protected activity was "at least one of the motivating causes of [employee's] discharge"); *John W. Campbell, Inc.*, 58 N.L.R.B. 1153, 1162-1163 (1944) ("Since, as the respondent's defense disclosed, it discharged the aforesaid three employees because they engaged in union activities protected under the Act, it is beside the point to show that, as the respondent further asserts, an additional [lawful] consideration * * * also lent weight to its decision."); *Carl L. Norden, Inc.*, 62 N.L.R.B. 828, 831 n.12 (1945) ("so long as one of the grounds for the discharge was discriminatory, it is immaterial that additional considerations may have lent weight to the respondent's decision to discharge [the employee]"). See also *Cupples Co. Manufacturers* v. *NLRB*, 106 F.2d 100, 117 (8th Cir. 1939) (violation found where the employee's "joining the union was at least a contributing cause of his discharge"); *Kansas City Power & Light Co.* v. *NLRB*, 111 F.2d 340, 348-349 (8th Cir. 1940) (transfer unlawful where "at least one purpose * * * was to affect and interfere with labor activities").

persuasion for that showing was on the employer, which was in the best position to separate the effects of legal and illegal motives. As the Board explained in a case involving a charge of discriminatory denial of reemployment:

> In claiming * * * that certain factors were present which would have precluded some employees from reemployment even in the absence of the illegal condition, the [employer] must assume the burden of "disentangling the consequences for which it was chargeable from those from which it was immune." * * * The question is * * * whether the [employer] would have refused employment to these employees entirely apart from the improper practices which we have found were committed. Where two motives for [an action] may have existed, one clearly improper and one a just cause for severance of the employer-employee relationship, and where the improper motive is found to have been present in general, we must require the [employer] to adduce clear and convincing proof that the [adverse action would have been taken] for proper cause entirely apart from illegal considerations.

Eagle-Picher Mining & Smelting Co., 16 N.L.R.B. 727, 801 (1939) (footnote omitted), enforced in relevant part, 119 F.2d 903 (8th Cir. 1941), quoting *NLRB* v. *Remington Rand, Inc.*, 94 F.2d 862, 872 (2d Cir.), cert. denied, 304 U.S. 576 (1938).[8]

---

[8] See also *Kelly-Springfield Tire Co.*, 6 N.L.R.B. 325, 342 (1938) ("[p]roof of the presence of proper causes at the time of discharge" is "not conclusive" in the absence of a showing by the employer that "such causes in fact induced the discharge"); *Borden Mills, Inc.*, 13 N.L.R.B. 459, 474-475 (1939) (suggesting that it may "constitute a defense to the unfair [labor] practice alleged to prove that the discharge would have taken place without consideration of the [impermissible] cause"); *Salmon & Cowin, Inc.*, 57 N.L.R.B. 845, 846 n.1 (1944) (violation found "in the absence of a showing by the respondent that [the lawful reason] alone would have induced it to deny [the employee] reinstatement"), enforced, 148 F.2d 941 (5th Cir.), cert. denied, 326 U.S. 758 (1945); *Phillip*

2. In 1947 Congress adopted the Taft-Hartley amendments, which substantially revised the Wagner Act in various respects. At that time Congress was aware of the Board's consistent position that employer action motivated even in part by unlawful considerations violated Section 8(a)(3) of the Act unless the employer could prove that it would have taken the same action absent those considerations. Congress considered and specifically rejected a provision that would have overruled the Board's practice in such cases.

Vandernoot, 64 N.L.R.B. 529, 537 (1945) (footnote omitted) ("[W]e * * * have here two causes, one legal, the other illegal. But unless [the employee] would have been discharged absent the illegal motivation, responsibility remains, and the burden was on the [employer] to disentangle the legal from the illegal."); *Wright-Hibbard Industrial Electric Truck Co.*, 67 N.L.R.B. 897, 908 n.15 (1946) ("This is not to be construed as a finding that the respondent might not have been under the imminent, or then present, necessity of reducing its force and that some employees, absent discrimination, would not have been laid off or discharged. By its general discrimination, however, it has placed itself in a position where it must bear the consequences of such action, for 'it rested upon the tortfeasor to disentangle the consequences for which it was chargeable from those from which it was immune,'" quoting *NLRB* v. *Remington Rand, supra*); *Robbins Tire & Rubber Co.*, 69 N.L.R.B. 440, 454 n.21 (1946) (employer required to "show that the discharges would have in any event taken place absent the illegal motivation"), enforced, 161 F.2d 798 (5th Cir. 1947); compare *Mallinckrodt Chemical Works*, 63 N.L.R.B. 373, 388 (1945) ("Since there is no showing that the [union] affiliation of any of the [employees] was a factor in bringing about the discharges[,] * * * [the employer] is not required to justify either the discharges or its procedure in connection therewith"). The courts of appeals also found it appropriate to require the employer to prove that it had acted for legitimate reasons in such cases. See, e.g., *NLRB* v. *Remington Rand, supra*, 94 F.2d at 871-872; *NLRB* v. *Kentucky Fire Brick Co.*, 99 F.2d 89, 92-93 (6th Cir. 1938); *NLRB* v. *Stackpole Carbon Co.*, 105 F.2d 167, 176 (3d Cir.), cert. denied, 308 U.S. 605 (1939); *NLRB* v. *Entwistle Mfg. Co.*, 120 F.2d 532, 536 (4th Cir. 1941); *NLRB* v. *Barrett Co.*, 135 F.2d 959, 961-962 (7th Cir. 1943); cf. *Martel Mills Corp.* v. *NLRB*, 114 F.2d 624, 632 (4th Cir. 1940); *Montgomery Ward & Co.* v. *NLRB*, 107 F.2d 555, 560 (7th Cir. 1939).

During the hearings on proposed amendments to the Wagner Act, industry representatives criticized the Board's practice in discriminatory discharge cases on the ground that the Board had found violations of the Act "[e]ven when the Board admits that an employee was guilty of misconduct justifying discharge."[9] In response to this criticism, the House Labor Committee proposed an amendment to Section 10(c) of the Act that would have required the Board to base its decisions upon the "weight of the evidence" (instead of "all the testimony taken") and would have precluded it from granting reinstatement or backpay to a discharged or suspended employee "unless the weight of the evidence shows that the individual was not suspended or discharged for cause." H.R. Rep. No. 245, 80th Cong., 1st Sess. 42, 58 (1947).[10] Dissenting

---

[9] See *Amendments to the National Labor Relations Act: Hearings on H.R. 8, H.R. 725, H.R. 880, H.R. 1095, and H.R. 1096 Before the House Comm. on Education and Labor*, 80th Cong., 1st Sess. 2723 (1947) (statement of Theodore R. Iserman).

The Board's policy proscribing discipline motivated either "wholly or in part" by impermissible considerations had already been brought to the attention of Congress through the Board's Annual Reports. 5 *NLRB Annual Report* 37-38 & n.39 (1941) (citing *Dow Chemical Co., supra*, among other cases); see also 3 *NLRB Annual Report* 65 (1939); 4 *NLRB Annual Report* 60 (1940); 6 *NLRB Annual Report* 45 (1942); 7 *NLRB Annual Report* 46 (1943). Compare *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 187 n.20 (1981); see also *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, No. 80-203 (May 3, 1982), slip op. 28 n.66.

[10] At several points the House committee (H.R. Rep. No. 245, *supra*, at 20, 41) referred to T. Iserman, *Industrial Peace and the Wagner Act* (1947). The Iserman volume (at pages 74-75) recommended:

> The Act * * * either should forbid the Board to reinstate an employee guilty of violating shop rules or for other misconduct or should state, in terms the Board would understand and have to follow, that when an employer shows proper grounds for discharging or otherwise disciplining an employee or for denying advancement to him, the Board shall not find that the em-

members of the House committee challenged the proposed amendment. They asserted that, if "weight of the evidence" meant more than "a preponderance of evidence," this would "hinder the prevention of unfair labor practices by rendering the proof of such practices more difficult." H.R. Rep. No. 245, *supra*, at 91. They noted also that the second change would require the Board "to find on 'the weight of the evidence' not only that the discharge was in violation of the [A]ct but also that the discharge was not for cause" (*id.* at 92). The dissenters contended that this change would "permit an employer to escape liability for having discharged an employee for his union activities merely if grounds existed which would justify the employee's discharge" and would therefore "render a nullity the protection afforded workers by the [Act] against discrimination because of union activities" (*id.* at 92-93).

Congress ultimately rejected the House effort to change the Board's practice. The conference committee modified the House amendment by deleting the phrase "[i]f upon the weight of the evidence" and substituting "[i]f upon the preponderance of the testimony taken." It revised the remedial limitation to state simply that the Board could not order relief for an employee who had been suspended or discharged "if such individual was suspended or discharged for cause." H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 13 (1947). These amendments to Section 10(c) were enacted by Congress, and the language remains in force today. See 29 U.S.C. 160(c).

Senator Taft, the Senate sponsor and floor manager of the Taft-Hartley amendments and a member of the conference committee, explained that the purpose of the conference amendment was to reaffirm the Board's existing practice under which, once the Board had shown an impermissible motive, the employer was to bear the bur-

---

ployer * * * discriminated against the employee for a purpose that Section 8(3) prohibits, except upon clear and direct evidence that the purpose was one that the Act forbids.

den of proving that it would have taken the same action for lawful reasons:

> The House language provided that the burden of proof should be on the employee to show that he was not discharged for cause. The Senate conferees took the position that the question was whether he was discharged for cause, and that the burden of proving that cause should be on the employer, because the information is in his hands. So we did not accept the House provision. All this language does is simply to say exactly what the present rule is. * * *
>
> * * * * *
>
> [T]here is no intention whatever to change the existing law on this particular question.
>
> * * * * *
>
> The original House provision was that no order of the Board could require the reinstatement of any individual or employee who had been suspended or discharged, unless the weight of the evidence showed that such individual was not suspended or discharged for cause. In other words, it was turned around so as to put the entire burden on the employee to show he was not discharged for cause. Under provision of the conference report, the employer has to make the proof. That is the present rule and the present practice of the Board.

93 Cong. Rec. 6518-6519 (1947). Senator Ball, another member of the conference committee, stated that under the conference amendment finding of an unfair labor practice would be warranted under Section 10(c) unless "the employer proves to the satisfaction of the Board that he discharged an employee for cause * * *. That is exactly the rule which the courts now require the * * * Board to follow." *Id.* at 7529.

The statements of Senators Taft and Ball demonstrate that, contrary to the view of the court below (*NLRB* v. *Wright Line*, *supra*, 662 F.2d at 904 n.8), the legislative history is not "inconclusive on the question of burden of proof," and that that question was addressed not "only

in the 'preponderance' language of * * * section 10(c)," but also in the limitation on remedial relief for employees discharged for cause. The statements of Senator Taft in particular could hardly be more plain: He understood the Board's rule to place the burden of proof on the employer who is shown to have relied on unlawful considerations, and he intended that aspect of the rule—the precise aspect of the *Wright Line* test that was rejected by the court of appeals—to continue in force. Those statements are entitled to particular weight. See *North Haven Board of Education* v. *Bell*, No. 80-986 (May 17, 1982), slip op. 14 ("remarks * * * of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction"); *NLRB* v. *Fruit Packers*, 377 U.S. 58, 66 (1964).[11]

Thus, in 1947, Congress specifically approved the allocation of burdens of proof reflected in the Board's stand-

---

[11] The statement of the House Managers that accompanies the conference bill is not to the contrary. See H.R. Rep. No. 510, *supra*, at 55. The statement explains the House Managers' view that the Board could find a violation only upon a "preponderance of the evidence" and that an employee shown to be discharged for cause was not to be afforded a statutory remedy, whether or not he was also engaged in union activities. However, nothing in this statement reflects disagreement with the views of Senators Taft and Ball that, once the Board has shown by a preponderance of evidence that the employer was motivated at least in part by unlawful considerations, "the employer has to make the proof" "to the satisfaction of the Board" that it would, in any event, have discharged the employee for good cause.

Little weight should be given to the remarks of Senator Pepper, who asserted in a colloquy with Senator Taft that the amendments to Section 10(c) would require a change in Board practice. See 93 Cong. Rec. 6518-6519. As this Court has noted, the views of the opponents of legislation are not an authoritative guide to its construction. *NLRB* v. *Fruit Packers*, *supra*, 377 U.S. at 66. As noted in the text, *supra*, Senator Taft, a sponsor of the amendments and a member of the conference committee, specifically rejected Senator Pepper's remarks and explained that the amendments reaffirmed the Board's existing practice of requiring the employer to bear the burden of proving that it would have taken the same action in any event.

ard, under which, once an impermissible motive was shown, an employer was afforded an opportunity to prove that it had acted for lawful reasons. As this Court has recently stressed, the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, "especially where Congress has refused to alter the administrative construction." *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 177 (1981), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). See also *North Haven Board of Education* v. *Bell, supra*, slip op. 16, quoting *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974) (The "deletion of a provision by a Conference Committee 'militates against a judgment that Congress intended a result that it expressly declined to enact.'"). The court below accordingly erred in disregarding Congress's approval of the Board's practice. By mandating a different standard, under which the General Counsel must prove that the employee's protected activity was the "but for" cause of the disciplinary action, the court of appeals has "adopt[ed] by judicial fiat an interpretation that Congress specifically rejected when it enacted the 1947 amendments to the NLRA" (*Jacksonville Bulk Terminals, Inc.* v. *International Longshoremen's Association*, No. 80-1045 (June 24, 1982), slip op. 17).

B. The Board's Allocation of Burdens of Proof Is Consistent With the Decisions of This Court, With Applicable Statutes and Regulations, and With Accepted Principles of Proof

Despite congressional approval of the Board's practice in dual motive Section 8(a)(3) cases, the court of appeals rejected the Board's *Wright Line* formulation of the allocation of burden of proof as contrary to the Board's statutory and regulatory authority and inconsistent with traditional principles of proof. The court also appears to have believed that the Board should have looked not to

Mt. Healthy City School District Board of Education v. *Doyle*, 429 U.S. 274 (1977), but rather to *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), as a model for allocation of burden of proof in Section 8(a)(3) cases. None of these grounds justifies the court's rejection of the Board's *Wright Line* test.

1. After Congress enacted the Taft-Hartley amendments, the Board adhered to its view that discipline "motivated in part by discriminatory reasons is unlawful, even if it may otherwise be motivated by lawful reasons." *Film Inspection Service, Inc.*, 144 N.L.R.B. 1040, 1042 & n.5 (1963) (collecting cases); and see *Wright Line*, *supra*, 251 N.L.R.B. at 1084 (collecting cases).[12] The Board also continued to permit an employer who had been motivated by both lawful and unlawful considerations to avoid liability if it succeeded in "disentangling the consequences" of its wrongdoing. See *Bedford Cut Stone Co.*, 235 N.L.R.B. 629, 629 (1978); *Klate Holt Co.*, 161 N.L.R.B. 1606, 1612 (1966). The Board's "in part" test continued to receive the approval of many courts of appeals, although the words used to describe the test varied from court to court.[13] In recent years, some courts, led by

---

[12] Soon after passage of the Taft-Hartley amendments, the Board analyzed the legislative history of the amendments and expressly rejected arguments that Congress had intended to change the Board's policy of requiring an employer whose unlawful motivation had been proven to "establish * * * that the discharges were not discriminatory but for cause." *Sioux City Brewing Co.*, 82 N.L.R.B. 1061, 1064 & n.11 (1949); *Standard Service Bureau*, 87 N.L.R.B. 1405, 1407 & n.5 (1949).

[13] See, e.g., *NLRB* v. *Great Eastern Color Lithographic Corp.*, 309 F.2d 352, 355 (2d Cir. 1962), cert. denied, 373 U.S. 950 (1963); *Edgewood Nursing Center, Inc.* v. *NLRB*, 581 F.2d 363, 368 (3d Cir. 1978); *Neptune Water Meter Co.* v. *NLRB*, 551 F.2d 568, 569 (4th Cir. 1977); *NLRB* v. *Big Three Industries, Inc.*, 497 F.2d 43, 49 (5th Cir. 1974); *NLRB* v. *West Side Carpet Cleaning Co.*, 329 F.2d 758, 761 (6th Cir. 1964); *Singer Co.* v. *NLRB*, 429 F.2d 172, 179 (8th Cir. 1970); *NLRB* v. *Ayer Lar Sanitarium*, 436 F.2d 45, 50 (9th Cir. 1970); *M.S.P. Industries, Inc.* v. *NLRB*, 568 F.2d 166, 173-174 (10th Cir. 1977); *Allen* v. *NLRB*, 561 F.2d 976, 982 (D.C. Cir. 1977); compare

the First Circuit,[14] became increasingly critical of the "in part" test, concluding that the test "ignores the legitimate business motive of the employer and places the union activist in an almost impregnable position once union animus has been established" (*Wright Line, supra*, 251 N.L.R.B. at 1084).

In response to the confusion that had developed, the Board formulated its *Wright Line* test in an effort to describe more clearly its standard for proof of discrimination in Section 8(a)(3) cases. The Board looked for guidance to this Court's decision in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), which involved the closely analogous issue of action taken against a public employee based on dual motives. In *Mt. Healthy*, the school board had denied tenure to a public school teacher for two stated reasons, one of which was that he had engaged in conduct protected by the First Amendment. The Court held that the employee could establish a claim to reinstatement if he was denied tenure on the ground that he had engaged in such constitutionally protected conduct. *Id.* at 283-284. However, the other reason stated by the school board was clearly a legitimate ground for denial of tenure. The question was whether reinstatement could be required under the circumstances. The court rejected a "rule of causation which focuses solely on whether protected con-

---

NLRB v. *Whitin Machine Works*, 204 F.2d 883, 885 (1st Cir. 1953) (approving "in part" test but suggesting that violation was proved only if "the union activity weighed more heavily in the decision" than the legitimate reason).

[14] See, e.g., *NLRB* v. *Billen Shoe Co.*, 397 F.2d 801, 803 (1st Cir. 1968) (when good cause for discharge appears, the burden is on the Board "to find an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one"); *NLRB* v. *Fibers Int'l Corp.*, 439 F.2d 1311, 1312 (1st Cir. 1971) ("Board has the burden of * * * showing that the employer's dominant motive was not a proper business one, but union animus"); *Coletti's Furniture, Inc.* v. *N.L.R.B.*, 550 F.2d 1292, 1293-1294 (1st Cir. 1977) ("[w]here there are both proper and allegedly improper

duct played a part, 'substantial' or otherwise" in the employer's decision.[15] *Id.* at 285. It ruled that the burden of proof should be allocated as follows (*id.* at 287; emphasis added; footnote omitted):

> Initially, * * * the burden was properly placed upon [the employee] to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" in the [School] Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the [School] Board *had shown by a preponderance of the evidence* that it would have reached the same decision

---

grounds for discharge, [the Board's] burden is to find affirmatively that the discharge would not have occurred but for the improper reason"). See also *Wright Line*, *supra*, 251 N.L.R.B. at 1084-1086 (collecting cases).

[15] The Court explained (429 U.S. at 285-286) that such a rule

> could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with [a "partial motive" test] is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision—even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

Thus, the Court addressed concerns similar to those voiced by the First Circuit and the other courts that have criticized the "in part" test used by the Board in dual motive Section 8(a)(3) cases.

> as to [the employee's] reemployment even in the absence of the protected conduct.

See also *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 270-271 n.21 (1977); *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 416-417 (1979).

The Board, in its *Wright Line* decision, reformulated its test for Section 8(a)(3) cases in similar terms after concluding that the two-step procedure established by the Court in *Mt. Healthy* would "maintain a substantive consistency with existing Board precedent and [also] accommodate the concerns expressed by critics of the ['partial motive' test]" (251 N.L.R.B. at 1083). Thus, under the *Wright Line* test, once the General Counsel demonstrates that the employer's opposition to protected activity was a "motivating factor" in a disciplinary decision, the employer can still avoid liability if it proves by a preponderance of the evidence that it would have taken the same action even in the absence of the unlawful motive (*id.* at 1089).[16] The Board noted that this reformulation did not constitute a repudiation of the "well-established principles and concepts" the Board had applied in the past, but that the *Mt. Healthy* test embodied a "more precise and formalized framework for making this analysis" and therefore would clarify the Board's decisional processes in a manner consistent with the objectives of the Act (*ibid.*).

Given the similarity between a *Mt. Healthy* case and a dual motive Section 8(a)(3) case, it was reasonable for

---

[16] Of course, the General Counsel may prove, as part of his prima facie case, or otherwise, that the employer's asserted reason for its action is a pretext. See *Wright Line*, *supra*, 251 N.L.R.B. at 1088 n.12; *Limestone Apparel Corp.*, 255 N.L.R.B. 722 (1981). In such cases, it is clear, without more, that the employer has not sustained its burden of proving that it would have acted for the asserted reason even absent its unlawful motivation, since the General Counsel has established that the employer had only an unlawful motive. See *NLRB* v. *Charles Batchelder Co.*, 646 F.2d 33, 43 (2d Cir. 1981) (Newman, J., concurring).

the Board to conclude that "the *Mt. Healthy* procedure * * * serv[es] to effectuate the policies and objectives of Section 8(a)(3)" (*Wright Line, supra*, 251 N.L.R.B. at 1088-1089). As the Board explained (*id.* at 1089):

> Under the *Mt. Healthy* test, the aggrieved employee is afforded protection since he or she is only required initially to show that protected activities played a role in the employer's decision. Also, the employer is provided with a formal framework within which to establish its asserted legitimate justification. In this context, it is the employer which has "to make the proof." Under this analysis, should the employer be able to demonstrate that the discipline or other action would have occurred absent protected activities, the employee cannot justly complain if the employer's action is upheld. Similarly, if the employer cannot make the necessary showing, it should not be heard to object to the employee's being made whole because its action will have been found to have been motivated by an unlawful consideration in a manner consistent with congressional intent, Supreme Court precedent, and established Board processes.

The court below thought *Mt. Healthy* inapposite because in that case the employer had conceded that its action was prompted partly by the employee's protected activity, while here respondent denied any such motivation. See *NLRB* v. *Wright Line, supra*, 662 F.2d at 906. But the court suggested no reason for distinguishing between a finding of an improper motivating factor based on an employer's admission and a finding based on the General Counsel's showing by a preponderance of the evidence. This Court has indicated that the *Mt. Healthy* approach to shifting the burden of proof is applicable to a case involving contested motivation. See *Village of Arlington Heights* v. *Metropolitan Housing Development Corp., supra*, 429 U.S. at 270-271 n.21.[17]

---

[17] Amicus Curiae Council on Labor Law Equality, on the other hand, agrees that *Mt. Healthy* is apposite but contends (Br. Urging Review 10-11) that it imposes on an employee seeking to establish

2. The court of appeals also concluded that the Board's adoption of the *Mt. Healthy* formulation for Section 8(a)(3) cases was improper because it was outside the Board's statutory authority insofar as it assigned to an employer shown to have discharged an employee at least in part because of his protected activity a "burden of persuasion" (i.e., a burden of showing by a preponderance of the evidence that it would have taken the same action absent the employee's protected activity), rather than merely a "burden of production" (i.e., a burden of coming forward with enough "evidence to balance, not to outweigh, the evidence produced by the general counsel"). *NLRB* v. *Wright Line*, *supra*, 662 F.2d at 904-905. The court believed that assigning any greater burden to the employer would conflict with the requirement in Section 10(c) of the Act, 29 U.S.C. 160(c), that the Board is to find an unfair labor practice "upon the preponderance of the testimony." *Id.* at 904. See also Pet. App. 3a, 4a-6a (concurring opinion). Accord: *Behring International, Inc.* v. *NLRB*, 675 F.2d 83, 86-90 (3d Cir. 1982), petition for cert. pending, No. 82-438 (filed Sept. 13, 1982).[18]

---

that he was discriminated against the burden of proving, not only that the employer had an unlawful motive, but that it was the "dominant motive" for the action. However, the Court's opinion in *Mt. Healthy* clearly shows that the Court rejected a "rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision" (*Mt. Healthy*, *supra*, 429 U.S. at 285; see also *Village of Arlington Heights*, *supra*, 429 U.S. at 265) and instead ruled that, once the employee has established that his protected activity was a "motivating factor" in the employer's decision, the burden then shifts to the employer to show "by a preponderance of the evidence that it would have reached the same decision * * * even in the absence of the protected conduct" (*Mt. Healthy*, *supra*, 429 U.S. at 287).

[18] While the First and Third Circuits have rejected the Board's *Wright Line* allocation of the burden of proof in dual motive Section 8(a)(3) cases, the Eighth and Ninth Circuits have specifically approved that allocation. See *NLRB* v. *Fixtures Mfg. Corp.*, 669 F.2d 547, 550 n.4 (8th Cir. 1982); *Zurn Industries, Inc.* v. *NLRB*, 680

The court's rejection of the Board's *Wright Line* allocation of the burden of proof appears to be based on a misunderstanding of *Wright Line*. The court mistakenly believed that the *Wright Line* approach results in shifting to the employer the ultimate burden of proving facts sufficient to show the existence or non-existence of an unfair labor practice. See 662 F.2d at 905. However, the Board stressed in *Wright Line* that its formulation "does not undermine the established concept that the General Counsel must establish an unfair labor practice by a preponderance of the evidence" and "does not shift the ultimate burden." 251 N.L.R.B. at 1088 n.11. The court below also appeared to believe that under the Board's formulation there would be insufficient consideration of the employer's "good" reasons as well as the General Counsel's evidence of improper motive. See 662 F.2d at 907. However, the Board in *Wright Line* described its goal to be to analyze "thoroughly and completely the justification presented by the employer." 251 N.L.R.B. at 1089.

At bottom, the court's conclusion appears to be grounded on an erroneous view of the nature of the "prima facie"

F.2d 683, 686-693 (9th Cir. 1982). The Sixth and Tenth Circuits have acknowledged the conflict, but have declined to rule on the issue. See *NLRB* v. *Carbonex Coal Co.*, 679 F.2d 200, 203-204 (10th Cir. 1982); *NLRB* v. *Comgeneral Corp.*, 684 F.2d 367, 369-370 (6th Cir. 1982); but see *Republic Die and Tool Co.* v. *NLRB*, 680 F.2d 463, 464-465 (6th Cir. 1982) (suggesting that the court had "accepted the Board's burden shifting formula as proper" in "numerous decisions"). While the Seventh Circuit appeared to accept the Board's *Wright Line* decision (see *Peavey Co.* v. *NLRB*, 648 F.2d 460, 461 (1981); *Justak Brothers and Co.* v. *NLRB*, 664 F.2d 1074, 1077 (1981)), that court has recently agreed with the position of the First and Third Circuits (see *NLRB* v. *Webb Ford, Inc.*, 689 F.2d 733, 739 (1982)). The Second Circuit, while not as yet ruling on the validity of the *Wright Line* test in a Board case (see *NLRB* v. *Charles Batchelder Co.*, 646 F.2d 33, 38-39 (1981)), has approved that test in a case of employee discrimination under the Energy Reorganization Act, 42 U.S.C. (Supp. IV) 5851 (see *Consolidated Edison Co. of New York, Inc.* v. *Donovan*, 673 F.2d 61 (1982)).

case established by the General Counsel before the employer is even faced with the opportunity to present an affirmative defense based on permissible motives. In the court's view, the General Counsel's prima facie case "creates a kind of presumption that an unfair labor practice has been committed," which the employer may be required to rebut by producing evidence of a "good" reason for the discharge. 662 F.2d at 905. According to the court, "the Board apparently feels that the Act is violated by a showing of anti-union sentiment in connection with a discharge." *Id.* at 906 n.12.

Under the Board's practice, however, the General Counsel's prima facie case consists of much more than the court suggests. The General Counsel must prove by a preponderance of the evidence that the employee's protected activity was *in fact* a motivating factor in the employer's disciplinary decision. Thus, in the present case the Board found that the General Counsel had proved that respondent, upon learning that a union drive was afoot, mounted an "extensive campaign" of interrogating employees and thereby determined that Santillo was "one of the prime organizers" (Pet. App. 19a-20a, 23a, 35a); that respondent displayed a "strong union animus" by this and other unlawful conduct (*id.* at 11a-12a, 33a-35a); that respondent's area manager explicitly threatened, among other things, to "get even" with Santillo for his union activism (*id.* at 20a, 33a); that Santillo was abruptly fired the first working day after that threat (*id.* at 24a-25a); and that the area manager, after discussing Santillo's union support with respondent's president, refused to put in writing the asserted reasons for the discharge (*ibid.*). Such proof goes well beyond a mere "showing of anti-union sentiment in connection with [Santillo's] discharge" (*NLRB* v. *Wright Line*, *supra*, 662 F.2d at 906 n.12); rather, as the Board concluded (Pet. App. 12a), it is "strong and credible evidence" that respondent's union animus was a "motivating factor" in the discharge decision. See also *Heartland Food Warehouse, Division of Purity Supreme Supermarkets*, 256

N.L.R.B. 940, 940 (1981) (finding that General Counsel had established that protected activities were factors in selection of employees for discharge), enforcement denied, 685 F.2d 421 (1st Cir. 1982), petition for cert. pending, No. 82-736 (filed October 28, 1982).[19]

Thus, the General Counsel must make out a prima facie case, not with some minimal showing aided by a presumption, but by proving by a preponderance of the evidence that the employee's protected activity was a motivation for the employer's disciplinary action.[20] That

---

[19] Board decisions show that mere "speculation" or "suspicion" premised on the discipline of an employee who engaged in protected activity is not enough to establish the presence of an unlawful motivating factor. See, e.g., *McCormick & Co.*, 254 N.L.R.B. 922, 923 (1981); cf. *Bay State Gas Co.*, 255 N.L.R.B. 708, 709 (1981). The Board requires direct or circumstantial evidence demonstrating the employer's knowledge of, and hostility to, the employee's protected activity before it will sustain the General Counsel's case. See, e.g., *Wolf Street Supermarkets, Inc.*, 264 N.L.R.B. No. 150 (Sept. 30, 1982), slip op. at 3 n.2, ALJD at 16 (General Counsel did not establish prima facie case of discriminatory refusal to rehire by adducing proof that employer failed to interview apparently qualified applicants from a shop that the employer knew to be unionized, while simultaneously interviewing other candidates, in absence of showing of union animus or other unlawful reason for the discriminatory conduct); *Electron Tube Division of Litton Systems, Inc.*, 260 N.L.R.B. No. 149, slip op. at 1-2 n.1 (Mar. 24, 1982) (coincidence of earlier discipline with organizing campaign insufficient to establish unlawful motivation in absence of union animus or other unfair labor practices by the employer); *Emory Nursing Home, Inc.*, 260 N.L.R.B. No. 71, ALJD at 5 (Feb. 26, 1982) (although the General Counsel proved "animus" and "suspicio[us]" timing of discharge, no prima facie case in absence of credible evidence that employer interrogated employee or was aware of her union activity); *United Broadcasting Co.*, 253 N.L.R.B. 697, 697 n.1 (1980) (no prima facie case where there was no showing of animus and little evidence of dischargee's involvement in protected activity); *Mineola Ford Sales, Ltd.*, 258 N.L.R.B. 406, 410 & n.3 (1981) (General Counsel did not establish prima facie case where employer was aware of union activity for many months before discharge); *Marriott Corp.*, 251 N.L.R.B. 1355, 1360 (1980) (no showing of anti-union motivation).

[20] The Board's *Wright Line* decision refers to the prima facie showing as consisting of evidence "sufficient to support the infer-

showing, without more, is sufficient to establish an unfair labor practice under Section 8(a)(3). Only after the General Counsel makes such a showing does the Board afford the employer the opportunity to avoid liability by demonstrating that some other legitimate motive would have led it to take the action in the absence of the protected activity.[21]

The burden that is shifted to the employer after the General Counsel has made his case is not a burden of proving itself innocent of the charge, as the court below seemed to believe. Rather, once the General Counsel has proved by a preponderance of the evidence that protected activity was a motivating factor in the employer's decision, thus establishing facts sufficient to constitute a violation, the employer is afforded the opportunity to show that, although it was motivated in part by the protected activity, it would have taken the same action for

---

ence" that protected activity was a motivating factor in the employer's decision. 251 N.L.R.B. at 1089. Use of the term "inference" does not suggest that the General Counsel's burden of proof is less than it would be in any other type of case. In many cases before the Board, the evidence is largely circumstantial, and the Board's ultimate finding therefore necessarily rests on inference from the proven facts. See *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 48-50 (1954).

[21] There is no merit to the suggestion of the Third Circuit, in *Behring International, Inc.* v. *NLRB*, *supra*, 675 F.2d at 86, 88, that, under *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and *Local 357, Teamsters* v. *NLRB*, 365 U.S. 667 (1961), the Act is violated only if an unlawful motive for the challenged discipline "outweighs" any legitimate motive, and hence constitutes the "true" or "real" purpose behind the employer's action. The cases cited do not address the problem of determining the legality of discipline motivated by both lawful and unlawful considerations, but deal only with the very different problem of determining whether an assertedly lawful ground is merely a pretext (see page 12 n.5, *supra*). Moreover, this Court has explicitly rejected a test that turns on whether unlawful factors "outweigh" lawful ones. See *Mt. Healthy* v. *Doyle*, *supra*, 429 U.S. at 285-286; *Village of Arlington Heights*, *supra*, 429 U.S. at 265. Under those decisions, a plaintiff is entitled to a remedy for damages he would not have suffered but for the defendant's improper motivation.

legitimate reasons, in the absence of the protected activity. Since the General Counsel has proved by a preponderance of the evidence that improper motivation played a role in the employer's decision, and thus has effectively shown that a statutory violation occurred, the employer that elects to offer this affirmative defense in order to avoid liability must show by a preponderance of the evidence that its wrongful motivation was harmless because the same result would have followed in the absence of the proven improper motivation.

The Court below suggested that the employer is required only to rebut the evidence presented by the General Counsel, not to offer an affirmative defense. 662 F.2d at 905 n.9. This confuses two different situations. It is always open to the employer to attempt to discredit the evidence adduced by the General Counsel, and, if it succeeds, the General Counsel has not shown by a preponderance of the evidence that protected activity was a motivating factor for the employer's decision. But, if the employer is unable to rebut the General Counsel's evidence, the General Counsel has established facts sufficient to constitute a violation; in that situation, the employer can avoid liability only by showing by a preponderance of the evidence that it would have taken the same action for legitimate reasons, in the absence of the protected activity. Mere production by the employer of "evidence of a good and sufficient motive for the discharge" (Pet. App. 5a), which is all the court of appeals would require, would not suffice. A showing that there was a good reason that *could* have accounted for the employer's decision simply is not enough to avoid liability based on the General Counsel's proof that the decision in fact was based, at least in part, on an unlawful reason.

The Board has not exceeded the bounds of its statutory and regulatory authority in allowing the employer the opportunity of establishing as a defense to liability that it would have taken the same action for legitimate reasons even in the absence of the protected activity. Under *Wright Line*, consistent with Section 10(c) of the

Act, the General Counsel must establish by a preponderance of the evidence a violation of Section 8(a)(3), i.e., he must establish that protected activity was a motivating factor in the employer's decision. Although Section 10(c) provides that the remedies of reinstatement and back pay shall not be available in the case of an employee who has been suspended or discharged for cause, it does not indicate that the General Counsel must disprove every alternative reason that is suggested by the employer in order to establish the existence of an unfair labor practice by the preponderance of the evidence. Even if the language of the statute created doubts, the 1947 legislative history makes clear that Congress intended under Section 10(c) to require the employer to prove that it would have taken the action for legitimate reasons in any event, once the General Counsel has established that protected activity was a motivating factor. See pages 17-22, *supra*.[23]

Contrary to the belief of the court of appeals, the *Wright Line* formulation is fully consistent with established principles of proof. The court cited a passage from *Wigmore on Evidence* concerning the distinction between

---

[23] The court below also cited (662 F.2d at 903) Section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d), which states that, unless otherwise provided by statute, the proponent of an order shall bear the burden of proof, as well as a section of the Board's rules, 29 C.F.R. 101.10(b), that provides that the General Counsel bears the burden of proving an unfair labor practice. Neither of these provisions supports the court's conclusion. The Administrative Procedure Act on its face indicates that a more specific provision of the National Labor Relations Act will govern. As shown in the text, *supra*, Section 10(c) of the Act authorizes the Board's allocation of burdens of proof in dual motive Section 8(a)(3) cases. In addition, Board practice is fully consistent with the Board's regulation. As noted in the text, *supra*, in establishing, by a preponderance of the evidence, that an employee's protected activity was a motivating factor in the employer's decision to discharge or discipline, the General Counsel satisfies the burden of proving facts sufficient to establish an unfair labor practice. Only after this burden is met is the employer required to establish a defense in order to avoid liability.

the burden of rebutting a prima facie case and the burden of persuading the trier of fact on the ultimate issue in a case by a preponderance of the evidence. 662 F.2d at 905. Wigmore, quoting *Speas* v. *Merchants Bank & Trust Co.*, 188 N.C. 524, 529, 125 S.E. 398, 401 (1924), discusses a situation in which a proponent has produced sufficient evidence to create a legally mandatory, rebuttable presumption; in that situation, the prima facie case need not be overcome by a preponderance of the evidence, or by evidence of greater weight, but need only be balanced by some evidence worthy of credence. See 9 J. Wigmore, *Evidence* §§ 2487, 2494 (Chadbourn Rev. 1981). The principle described by Wigmore applies to the General Counsel's proof under *Wright Line*. If the General Counsel produces evidence sufficient to permit an inference that protected activity was a motivating factor in the employer's decision, the employer may rebut that evidence directly in an attempt to undermine the inference. If the employer succeeds in "balancing" the General Counsel's evidence, the General Counsel has failed to meet his burden of showing by a preponderance of the evidence that protected activity in fact was a motivating factor in the decision (see page 33, *supra*). This is because the burden of persuasion on that issue always remains with the General Counsel. However, if the employer fails to "balance" the evidence, the General Counsel has met his burden of persuasion and has established that an improper consideration in fact motivated the decision. At that point, the employer can escape liability only by establishing as an affirmative defense that its unlawful motive did not result in any harm, since it would have taken the same action in the absence of the unlawful motive. It is entirely consistent with established principles of proof for the burden of persuasion to rest with the employer to establish this affirmative defense. See, e.g., 9 *Wigmore*, *supra*, § 2485 at 287.[23]

[23] Fed. R. Evid. 301, also referred to by the court below (662 F.2d at 905), is concerned with the evidence necessary to rebut a presumption, not with the proof required to establish an affirmative de-

The test favored by the court of appeals would diminish substantially the protection the Act was intended to afford employees engaged in union or other concerted activity. Under the court of appeals' standard, even after the General Counsel has established by a preponderance of the evidence that opposition to the employee's protected activity was a motivating factor in the employer's disciplinary decision, the employer would be required to show merely that there was also a legitimate reason that *could* have caused the decision. At this point, the burden of showing that the employee was not in fact disciplined for the good reason would shift to the General Counsel (and the employee, whom he represents). In many cases, it would be difficult, if not impossible, to sustain this burden. Few employees are so perfect that an employer could not find some reason that *might* have warranted discipline of the employee.[24] Accordingly, unless

---

fense once a violation has been effectively established by a preponderance of the evidence, which is the issue in this case.

[24] The Third Circuit's discussion of *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), suggests that it may believe that, under that decision, the employer is required only to articulate some legitimate reason for its action. See *Behring International, Inc.* v. *NLRB*, *supra*, 675 F.2d at 88-89. See pages 38-43, *infra*. *Burdine* requires the employer to go further and offer some evidence of a causal relationship between the legitimate reason and the employer's decision (450 U.S. at 254-255). However, even under this standard, the rule of the court below would leave the employee in an untenable position. For the production of some evidence of a legitimate reason for the employer's decision still does not prove that the employer would have made that decision for the legitimate reason in the absence of any protected activity. The employer is in the best position to make this additional proof, and it is only reasonable to require it to do so, since the General Counsel has already carried his burden of proving that discriminatory animus did in fact play a role in the employer's decision.

This Court, in *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 34 (1967) (emphasis in original), recognized that the employer is in a superior position to prove motivation by legitimate objectives:

> [I]f the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motiva-

the General Counsel could show that the lawful reason asserted by the employer was a pretext or was not a ground for disciplining other employees who had not engaged in protected activity, it is very likely that many employees who were disciplined for engaging in protected activity would be denied redress because of their inability to prove a negative (that they were not discharged for cause). Such a result would seriously chill the exercise of Section 7 rights by employees, by undermining the effectiveness of the statutory protection for exercise of those rights.

In contrast, an entirely proper burden is placed on the employer if it takes advantage of the opportunity to show by a preponderance of the evidence that it would have taken the same action for lawful reasons in any event. The evidence already establishes that the employer was motivated, at least in part, by unlawful considerations. At this point, requiring the employer—the proven wrongdoer—to prove an independently sufficient cause is only common sense. As Congress recognized (see pages 19-20, *supra*), the employer is in the best position to know, and thus to prove, whether it would have taken the same action even apart from the unlawful considerations.[35] The

---

tion must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus * * * once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

[35] The Board's *Wright Line* test has provided employers with a meaningful opportunity to establish a defense. Under it, the Board has sustained disciplinary actions by employers even in cases in which the General Counsel has sucessfully demonstrated, or the employer has actually admitted, that it was motivated in part by hostility to protected activity. See, e.g., *Fieldcrest Mills, Inc.*, 264 N.L.R.B. No. 86, slip op. at 2 (Sept. 30, 1982) (while General Counsel had established an impermissible "motivating factor," the employer had shown that it would have discharged the employee in any

Board's approach thus properly accommodates the legitimate interests of all parties to a Section 8(a)(3) proceeding.

3. The court of appeals, in rejecting the Board's *Wright Line* test, also cited (662 F.2d at 907) *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), implying that *Wright Line* is inconsistent with *Burdine*. See also *Behring International, Inc.* v. *NLRB*, *supra*, 675 F.2d at 88-89, in which the Third Circuit cited *Burdine* in rejecting the Board's *Wright Line* test. We submit that the Board's *Wright Line* ap-

---

event because of his infractions of company rules); *Pacific Intermountain Express Co.*, 264 N.L.R.B. No. 47, slip op. at 7-9 (Sept. 30, 1982) (employee deliberately disobeyed employer's instruction to return to work); *WNAC-TV Division, RKO General, Inc.*, 264 N.L.R.B. No. 31, ALJD at 11-17 (Sept. 28, 1982) (marginal performance as broadcast journalist); *Host Services, Inc.*, 263 N.L.R.B. No. 86, slip op. at 2-3 & n.3 (Aug. 24, 1982) (cursing supervisor without provocation); *Eaton Corp.*, 262 N.L.R.B. No. 18, ALJD at 20-21 (June 9, 1982) (employee made many mistakes and had received numerous written warnings); *Coil-ACC, Inc.*, 262 N.L.R.B. No. 12, ALJD at 9-12 (June 9, 1982) (driver had too many accidents); *Allied Eastern States Maintenance Corp.*, 261 N.L.R.B. No. 167, slip op. at 2, ALJD at 5-8 (May 28, 1982) ("long history of irritation" with employee's conduct justified discharge, notwithstanding admission that one reason for discharge was employee's advising other workers of "their union rights"); *Lafayette Steel Erector, Inc.*, 260 N.L.R.B. No. 160, ALJD at 4-5 & n.11 (Mar. 26, 1982) (bona fide reduction-in-force); *Eau Claire Press Co.*, 260 N.L.R.B. No. 148, ALJD at 8, 9-12 (Mar. 19, 1982) (employee violated rule requiring workers to secure own replacement when absent); *St. Joseph Hospital Corp.*, 260 N.L.R.B. No. 89, slip op. at 7-11 & n.13 (Mar. 8, 1982) (employee's leadership role in unprotected picketing justified suspension, notwithstanding admission that other protected activity was a "motivating factor" in suspension); *Parker Hannifin Corp.*, 259 N.L.R.B. 263, 266-267 (1981) (employee demonstrated growing propensity to leave work place during working time notwithstanding warnings); *Litton Mellonics Systems Division, a Division of Litton Systems, Inc.*, 258 N.L.R.B. 623, 625-626 (1981) (employer demonstrated substantial savings and other business advantages in relocation partly motivated by opposition to employees' protected activities).

proach is fully consistent with *Burdine*, which sets out the manner in which a plaintiff may prove intentional employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* In suggesting otherwise, the court below and the Third Circuit appear to have confused the elements of proof addressed in *Wright Line* and *Burdine*.

The ultimate proof the Title VII plaintiff must make under *Burdine* is similar to that made by the Board's General Counsel in a Section 8(a)(3) case. The Court in *Burdine* concluded that the Title VII plaintiff could make her ultimate proof by means of a three-step process. First, the plaintiff could make an initial showing simply that "she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." 450 U.S. at 253 (footnote omitted). See also *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973); compare *United States Postal Service Board of Governors* v. *Aikens*, No. 81-1044 (argued Nov. 9, 1982). That showing, or prima facie case, "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577 (1978). Under *Burdine* the plaintiff's initial showing creates a "presumption" that the employer unlawfully discriminated against the employee.[26] 450 U.S. at 254. Once the plaintiff has made that initial showing, the employer must rebut the presumption of discrimination by producing evidence of a legitimate, nondiscriminatory reason for its action, but is not required to "persuade the court that it was actually motivated by the proffered reasons." 450 U.S. at 254. If the employer raises a "genuine issue of fact" concerning whether it discriminated against the

---

[26] No similar presumption of discriminatory motivation has been established in Board practice. See page 31, n.19, *supra*.

plaintiff (*id.* at 254-255), the plaintiff then must discharge his or her burden of persuasion and prove conclusively the employer's discriminatory motive.[27] This three-step shifting of burdens, which is intended to sharpen the inquiry into the question of discriminatory intent, leads finally to the "ultimate finding of fact" on that issue. *Furnco Construction Corp.* v. *Waters*, *supra*, 438 U.S. at 576; *Burdine*, *supra*, 450 U.S. at 256.

The showing made by the General Counsel in order to sustain his burden of proof under the *Wright Line* test is essentially the same as the Title VII plaintiff's conclusive proof of the ultimate finding of fact of the employer's discriminatory motive. In connection with this showing the Board has not provided specifically for the sort of intermediate shifts in burden of proof and production that are set out in *Burdine*. However, in order to meet his burden under *Wright Line*, i.e., to show that protected activity was a motivating factor in an employer's decision, the General Counsel must make a showing comparable to what the Title VII plaintiff ultimately proves at the completion of the third step of the *Burdine* inquiry.

Only after the General Counsel has proved the ultimate fact of discriminatory motive does *Wright Line* provide that the burden of persuasion shifts to the employer. This is a stage that the *Burdine* analysis does not even reach. To find a Title VII analogy to this part of the *Wright Line* test, it is necessary to examine Title VII cases that address the procedure to be used after a plaintiff establishes discrimination. In such cases, dealing with the appropriate remedy for the proven discrimination, the employer is required to assume the burden of proving that the action at issue would have been taken notwith-

---

[27] The plaintiff can discharge his or her "ultimate" burden on motive "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U.S. at 256.

standing the unlawful discrimination.[28] See, e.g., *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 772-773 & n.32 (1976) ("[n]o reason appears * * * why the victim rather than the perpetrator of the illegal act should bear the burden of proof" on the issue of whether the employer's proven discrimination, rather than the employee's job performance but for the discrimination, caused the failure to hire); *Teamsters* v. *United States*, 431 U.S. 324, 362 (1977) (same); *id.* at 369 n.53 (once nonapplicant presented information on qualifications, burden was on employer to show nonapplicant was not a victim of discrimination); *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395, 404 n.9 (1977) ("[e]ven assuming * * * that the company's failure even to consider the applications was discriminatory, the company was entitled to prove at trial that the respondents had not been injured because they were not qualified and would not have been hired in any event," citing, *inter alia*, *Mt. Healthy*).[29] Indeed, even if the employer can prove that

---

[28] This Court has prescribed a similar allocation of burden of proof in a case involving allegations of unconstitutional racial discrimination in a non-employment context. In *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, *supra*, 429 U.S. at 265-266, 270-271 n.21, the Court stated:

> When there is a proof that a discriminatory purpose has been a motivating factor in the [challenged] decision * * * judicial deference is no longer justified.
>
> * * * * *
>
> Proof that the decision * * * was motivated in part by a racially discriminatory purpose * * * shift[s] to the [decision-maker] the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.

[29] Most courts of appeals in Title VII cases likewise have concluded that the defending employer should carry the burden of persuasion on the issue of independent causation, once discrimination has been proved. See, e.g., *Walker* v. *Ford Motor Co.*, 684 F.2d 1355, 1362 & n.9 (11th Cir. 1982); *Lee* v. *Russell County Board of Education*, 684 F.2d 769, 773-774 (11th Cir. 1982); *Muntin* v. *State of California Parks and Recreation Department*, 671

it would have taken the same action in the absence of the proven discrimination, the court in a Title VII case may impose a non-individual remedy, including injunctive relief and record-keeping or notification requirements. See, e.g., *Teamsters* v. *United States*, *supra*, 431 U.S. at 361; *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 751.[30]

F.2d 360, 363 (9th Cir. 1982); *Nanty* v. *Barrows Co.*, 660 F.2d 1327, 1333 (9th Cir. 1981); *League of United Latin American Citizens* v. *City of Salinas Fire Department*, 654 F.2d 557, 558-559 (9th Cir. 1981); see also *Williams* v. *Boorstin*, 663 F.2d 109, 117 (D.C. Cir. 1980); *Milton* v. *Weinberger*, 645 F.2d 1070, 1077 n.17 (D.C. Cir. 1981); *Bundy* v. *Jackson*, 641 F.2d 934, 951-953 (D.C. Cir. 1981).

Two court of appeals cases appear to conclude that the employee bears the burden of persuasion on the issue of independent causation in a Title VII case. See *De Anda* v. *St. Joseph Hospital*, 671 F.2d 850, 857 n.12 (5th Cir. 1982), and *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1019-1020 (1st Cir. 1979). In both cases, the courts apparently rely on the Court's brief statement in *McDonald* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, 282 n.10 (1976), that "no more is required to be shown than that race was a 'but for' cause," as opposed to the sole reason for rejection or discharge. The Court's abbreviated statement in *McDonald*, which was made before its decision in *Mt. Healthy*, did not indicate which party was to bear the burden of proof on the issue of independent causation. Following its decision in *Mt. Healthy*, the Court clarified the situation in *East Texas Motor Freight System* v. *Rodriguez*, *supra*, 431 U.S. at 404 n.9, in which it indicated that the *Mt. Healthy* approach to shifting burdens of proof should be applied in Title VII cases. See also *Teamsters* v. *United States*, *supra*, 431 U.S. at 362, 368, 369 n.53. Thus, *De Anda* and *Loeb* appear to be based on an incorrect reading of the Title VII cases.

[30] In this respect, the Board's *Wright Line* test treats employers in a dual motive Section 8(a)(3) case more favorably than they would be treated in a comparable dual motive Title VII case. In Title VII cases a court finds a violation even if proven discrimination is not found to have affected individual employment decisions; the effect of legitimate motives on individual decisions may affect the award of individual relief, but not the finding of a violation and

The court below and the Third Circuit appear to have believed that the burden of proof imposed on the General Counsel under *Wright Line* is analogous to the initial showing made by the Title VII plaintiff as the first step of the *Burdine* analysis.[31] Thus, those courts concluded that, in a Section 8(a)(3) case, as under *Burdine*, only a burden of production should switch to the employer. This analogy to *Burdine* is simply incorrect, since the General Counsel's required showing under *Wright Line* is comparable to the ultimate showing to be made by the Title VII plaintiff under *Burdine*. This Court has indicated in *East Texas Motor Freight System, Inc.* v. *Rodriguez*, *supra*, 431 U.S. at 404 n.9, that, following a showing of discrimination by a Title VII plaintiff, the burden of

---

the award of general injunctive relief. In contrast, in a dual motive Section 8(a)(3) case, the Board has concluded that an employer that has been shown to have acted on the basis of a discriminatory motive may escape liability entirely, and thus may avoid entry of a cease and desist order against it, if it can show that it would have taken the same action for legitimate reasons in the absence of the discriminatory motive.

[31] Some confusion may have resulted from the fact that the Board used the term "prima facie" case to describe the General Counsel's burden under *Wright Line* (251 N.L.R.B. at 1089). This Court used the same term to describe the initial showing made by a Title VII plaintiff under the *Burdine* analysis. 450 U.S. at 253. As shown above, the General Counsel's prima facie case under *Wright Line* actually entails proof of the ultimate fact of discriminatory motive and is not analogous to the limited initial showing required of the Title VII plaintiff under the three-part *Burdine* analysis. Like a Title VII plaintiff, the General Counsel always bears the burden of persuasion on the issue of discriminatory motivation. In a Title VII disparate treatment case, that showing will often depend on the employee's ability to support an inference of discrimination by proving the employer's asserted legitimate justification to be a pretext. In an unfair labor practice proceeding, the General Counsel is more likely to be able to establish discriminatory animus without regard to whether a legitimate reason may also have contributed to the employer's decision.

persuasion shifts to the employer, consistent with the *Mt. Healthy* analysis. In *Wright Line* the Board came to a similar conclusion with respect to Section 8(a)(3) cases. Thus, *Wright Line* is fully consistent with the standards this Court has established in the Title VII cases.

C. The Board Concluded Correctly That, Following the General Counsel's Prima Facie Showing, the Respondent Did Not Sustain Its Burden of Showing by a Preponderance of the Evidence That It Would Have Discharged Santillo for Cause Even Absent His Union Activity

The Board found that the General Counsel had "established by strong and credible evidence a *prima facie* case" that respondent's union animus was a "motivating factor" in its decision to discharge Santillo. See page 30, *supra*. The court below did not disturb this finding;[32] nor did the court suggest that it disagreed with the Board's factual determination that respondent failed to establish that it would have taken the same action even in the absence of Santillo's union activity. Rather, the court concluded erroneously that, as a matter of law, respondent could not be required to sustain such a burden, and it refused to enforce the Board's order on that ground alone (Pet. App. 3a).

The Board's determination that respondent did not meet its burden is clearly supported by substantial evidence on the record as a whole. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951). Thus, as the Board concluded (Pet. App. 36a), respondent cannot rely on Santillo's leaving his keys in his bus; the record shows that doing so was "common" (*ibid.*) among the drivers and that the company official who discharged Santillo ad-

[32] Indeed, the court expressly sustained (Pet. App. 2a) the factual findings that underlay the Board's conclusion that respondent exhibited "strong union animus" and that it had singled out Santillo as a union instigator and had specifically threatened to take retaliatory action against him.

mittedly decided to do so without relying on that ground (see pages 5-6, *supra*). Nor were Santillo's coffee breaks a dischargeable offense; there, too, the record reveals that such breaks were commonplace at the shop and that "[i]n no case * * * [was a] discharge, suspension or any other kind of disciplinary action taken against employees for engaging in such conduct" (Pet. App. 37a; see page 6, *supra*). Finally, respondent's reliance on Santillo's unauthorized stops at home is equally unavailing; notwithstanding its policy of issuing three warnings prior to a discharge, respondent never confronted Santillo about his unauthorized stops after it had confirmed them; nor did it warn him that such misconduct might lead to disciplinary action (see page 6, *supra*).

In sum, the record amply supports the Board's finding (Pet. App. 13a) that respondent "failed to meet its burden of overcoming the General Counsel's *prima facie* case by establishing by competent evidence that Santillo would have been discharged, even absent his union activities." As shown above, application of that test is fully consistent with the Act and with the decisions of this Court. The Board's conclusion that respondent violated Section 8(a)(3) of the Act in discharging Santillo and its order remedying that violation should be sustained.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

LAWRENCE G. WALLACE
Deputy Solicitor General

CAROLYN F. CORWIN
Assistant to the Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

RICHARD MICHAEL FISCHL
Attorney

National Labor Relations Board

JANUARY 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 688279 1251